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THE "LIVING TOGETHER" ARGUMENT IN THE EUROPEAN COURT OF HUMAN RIGHTS CASE-LAW

1. THE QUESTION OF RELIGIOUS MINORITY RIGHTS IN EUROPE

The number of decisions upholding legislative measures restricting the right to wear religious symbols is mushrooming in Europe. In 2017, the Court of Justice of the European Union ruled on the case of *Achbita v. G4S Secure Solutions*.[1] It held that the internal rule of a private company prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, specifically the Islamic headscarf, did not constitute *direct* discrimination based on religion or belief according to EU antidiscrimination law.[2] It was found, however, that it could constitute a form of *indirect* discrimination, which may only be objectively justified by the legitimate aim of the neutrality of the

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[1] *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, No. C-157/15 (EUCJ, 2017); *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v. Micropole SA*, No. C-188/15 (EUCJ, 2017).

[2] Council Directive 2000/78/EC of 27 November 2000.

business, provided that the means of achieving that aim are appropriate and necessary.[3] On the other hand, the European Court of Human Rights (ECtHR) has reverted to the question of religious symbols covering the face in public spaces (*burqa* and *niqab*), adjudicating two cases involving the Belgian ban: it upheld the national legislative measures, appealing for the second time in its jurisprudence to the contested argument of "living together."[4]

This article focuses on the latter issue. It starts by recounting the history of the drafting process of legislation banning the full-face veil in Belgium and France and the pivotal notion of "living together" [Section 2]. Secondly, it summarizes the facts of the three relevant cases adjudicated by the Court of Strasbourg: *SAS v. France* (2014)*, Belcacemi and Oussar v. Belgium*, and *Dakir v. Belgium* (2017) [Section 3]. Afterwards, the paper recalls the general principles protecting religious freedom under the European Convention of Human Rights (ECHR) [Section 4]. Thus, it explains the decisions of these cases paying attention to the way the Court used "living together" as a legal justification for the prohibition of the full-face veil [Section 5]. Finally, on the basis of the aforementioned material, it argues two points: 1. the ECtHR did not offer in its decisions a robust legal analysis to legitimize this new argument and these cases represent a culmination of the tendency towards legal decisions based on abstract ideas [Section 6]; 2. an engaged Court should adopt a more fact-oriented approach, in view of the fact that the proportionality principle is expressly incorporated in the Convention [Section 7].

[3] Eva Brems et al., "Head-Covering Bans in Belgian Courtrooms and Beyond: Headscarf Persecution and the Complicity of Supranational Courts," *Human Rights Quarterly* 39, no. 4 (2017): 882-909; Lucy Vickers, "Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace," *European Labour Law Journal* 8, no. 3 (2017): 232–57.

[4] *SAS v. France*, No. 43835/11 (ECtHR, Grand Chamber 2014); *Belcacemi and Oussar v. Belgium*, No. 37798/13 (ECtHR 2017); *Dakir v. Belgium*, No. 4619/12 (ECtHR 2017).

2. THE DEBATE SURROUNDING THE NOTION OF "LIVING TOGETHER": ITS ESSENCE AND CHARACTERISTICS

In this Section, the article describes the drafting process of the legislation banning the full-face veil in Belgium and France and briefly outlines the constitutional background surrounding it as well as the way the "living together" argument has emerged. Afterwards, it offers an analysis of its features and meaning.

2.1. THE LEGAL DISCUSSION: THE DRAFTING PROCESS OF THE LAWS AND THE CONSTITUTIONAL BACKGROUND

The topic of the full-face veil ban has been subject to a particularly high level of attention from commentators and constitutional lawyers. On the one hand, this issue relates to some of the fundamental pillars of the Belgian and French legal orders and raises questions on the compatibility of the full-face veil with the principles of *laïcité*, fraternity and dignity of women.[5] On the other hand, there is discordance between the apparently neutral nature of the bans, which forbid the concealment of the face in public, and the people's specific preoccupation with the Islamic veil shown by the *travaux preparatoires*, which provide a record of the discussion that took place during the drafting of the legislation.[6] This calls into question some doubts relating to the supposedly neutral nature of the ban and merits an enquiry into the possibility that it is discriminative on religious grounds.[7]

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[5] Constantin Languille, *La Possibilité du Cosmopolitisme. Burqa, Droits de l'homme et Vivre-Ensemble* (Paris: Gallimard, 2015), 9.

[6] Eva Brems, Jogchum Vrielink, and Saïla Ouald Chaib, "Uncovering French and Belgian Face Covering Bans," *Journal of Law, Religion and State* 2, no. 1 (2013): 74.

[7] Myriam Hunter-Henin, "Why the French Don't Like the Burqa: Laïcité, National Identity and Religious Freedom," *International & Comparative Law Quarterly* 61, no. 03 (July 2012): 613-639.

2.1.1 BELGIUM

In Belgium, the drafting process of the full-face ban has been one of the flagship policies of the right-wing *Vlaams Blok* party.[8] The first proposal dates back to 2004 and other attempts occurred between 2007 and 2010.[9] Soon after the 2010 elections, the bill was approved by an overwhelming majority[10] and was subject to an extremely fast legislative process, involving only one of the two parliamentary Chambers.[11] Questions concerning human rights and individual fundamental freedoms were not addressed in depth – it has been noted that the debate carried out amounted to no more than a "pure formality done out of respect for the required democratic debate."[12]

2.1.2 FRANCE

The French reflection on the meaning of the *vivre ensemble* concept, and more generally the ideal of *République à visage découvert*, represented, as expressed by Constantin Languille, an "ideal scene where all the arguments relating to the place of Islam in French society were expressed and opposed against each other."[13] In France, as in Belgium, the proposal for a ban was first put forward by a right-wing party;[14] though here it did go through a more sophisticated drafting process, involving experts, *ad hoc* commissions and decisions delivered by the

[8] Eva Brems, Saila Ouald-Chaib, and Jogchum Vrielink, "The Belgian «Burqa Ban»: Legal Aspects of Local and General Prohibitions on Covering and Concealing One's Face in Belgium," in *The Burqa Affair across Europe: Between Public and Private Space*, eds. Alessandro Ferrari and Sabrina Pastorelli (Farnham, Surrey: Routledge, 2016), 157.

[9] *Ibid*.

[10] 129 ayes, 1 nay and 2 abstentions. Ghent University Human Rights Centre, "Written Submission by the Human Rights Centre of Ghent University in the Case of SAS v. France," 2014, 4, http://www.hrc.ugent.be.

[11] The *Chambre des Représentants* and the *Sénat*. *Ibid*.

[12] Xavier Delgrange, "La loi «anti-burqa» comme symptôme," *Politique - Revue de débats*, no. 74 (2012), 42-50. Translation mine.

[13] Languille, *La Possibilité Du Cosmopolitisme. Burqa, Droits de l'homme et Vivre-Ensemble*, 8.

[14] Jacques Myard an MP for the Centre-Right UMP. See *Proposition de loi visant à lutter contre les atteintes à la dignité de la femme résultant de certaines pratiques religieuses*, Parliamentary documents no. 3056, 4 October 2006.

highest judicial institutions.[15] In 2010, the report of the *Gerìn* Commission was published,[16] stating that the full veil infringed three constitutive principles of the French Republic – liberty, equality and brotherhood, since it represented a rejection of the common will to live together.[17] Shortly after, the Council of State expressed an opinion that a general ban had no certain legal basis and the idea of "living together" had no solid doctrinal background. Despite this, in 2010 the general ban was enacted by a great majority,[18] and was followed by a decision of the *Conseil Constitutionnel*,[19] acknowledging its constitutionality.[20]

2.2. FIRST MEANING OF THE CONCEPT OF "LIVING TOGETHER": A PRE-CONDITION FOR COMMUNICATION AMONG INDIVIDUALS

In both Belgian and French social, legal and political scenarios, the idea of "living together" comprises two aspects: one relates to communication, the other relates to the need to build a mutual trust necessary for the enjoyment of rights and liberties by all the members of society.

The first meaning of "living together" deals with the proposed benefits of people being able to communicate face to face, which is argued to be an essential aspect of verbal and non-verbal exchanges.[21] As far as this argument is related to the wearing of the Islamic veil, this

[15] Human Rights Centre of Ghent University, "Written Submission by the Human Rights Centre of Ghent University in the Case of Dakir v. Belgium," 2016, 2-3, http://www.hrc.ugent.be.

[16] A. Gérin, "Rapport d'information fait en application de l'article 145 du règlement au nom de la mission d'information sur la pratique du port du voile intégral sur le territoire national," 26 January 2010, www.assemblee-nationale.fr, in particular pages, 71 ff.

[17] *Ibid*.

[18] 335 ayes, only 1 nay, and 221 abstentions and, in the Senate 246 ayes, 1 nay, and 100 abstentions: Eva Brems, ed., *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge, UK: Cambridge University Press, 2014), 7.

[19] Conseil Constitutionnel, 7 October 2010, no. 2010-613613 DC.

[20] The *Conseil Constitutionnel* made only minor reservations on places of worship, which had not to be covered by the ban. *Ibid*., at para. 5.

[21] Armin Steinbach, "Burqas and Bans: The Wearing of Religious Symbols under the European Convention of Human Rights," *Cambridge Journal of International and Comparative Law* 4 (2015): 46.

argument is not exclusive to the French and Belgian contexts, but it has been addressed and explored also by judges of different jurisdictions, such as in England and the Netherlands.[22]

While the argument of interaction in society and the need to establish a proper environment for the best communication of individuals has been deployed particularly in the educational context, the second aspect of the "living together" concept has a wider significance and has been developed in relation to society as a whole.

2.3. THE SECOND MEANING OF "LIVING TOGETHER": A PRE-CONDITION TO ENTER SOCIETY

The second meaning of *vivre ensemble* originated in the writing on human sociology by the French Jewish philosopher Emmanuel Lévinas (1906–1995).[23] Afterwards, it inspired the Belgian Guy Haarscher (1946), who applied it specifically to the wearing of the full-face veil.[24] In their view, the ability to see people's faces prevents the creation of a disruptive asymmetry between those who show themselves and those who do not. Most of all, the *rapport de face à face* is a minimal precondition for building mutual trust, for a peaceful cohabitation in society and is an essential ingredient of ethical behaviour.[25] This idea was also cited during the French and Belgian political debate as a rationale in support of what is known as the *burqa* ban.

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[22] *Azmi v. Kirklees Metropolitan Borough Council*, No. UKEAT 0009/07/3003 (Employment Appeal Tribunal 2007); *R (on the application of X) v. Headteachers of Y School and another* (Queen's Bench 2007); Commissie Gelijke Behandeling (*Netherlands Commission for Gender Equality*), Judgment no. 40 of 2003). See Anastasia Vakulenko, *Islamic Veiling in Legal Discourse* (New York: Routledge, 2012), 39.

[23] Bettina Bergo, "Emmanuel Levinas," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 2015, http://plato.stanford.edu.

[24] Hugues Dumont and Xavier Delgrange, "Le Principe de Pluralisme Face à la Question du Voile Islamique en Belgique," *Droit et société*, no. 68 (2008): 75-108. See also Guy Haarscher, "Secularism, the Veil and Reasonable Interlocutors: Why France Is Not That Wrong," *Penn State International Law Review* 28, no. 3 (2010-2009): 367-82.

[25] François-Xavier Millet, "When the European Court of Human Rights Encounters the Face," *European Constitutional Law Review* 11, no. 02 (2015): 408-424.

Indeed, the French drafters of the 2010 law considered that the regular wearing of the veil corresponds to a systematic betrayal of the fundamental values of democracy and a threat to national cohesion.[26] Also in Belgium, the legislature primarily pursued the creation of a proper space for social interaction between individuals, relying on the idea of *reconnaître pour connaître.*[27] For example, the 2011 *Report to Chambre Des Représentants de Belgique* states that wearing the full-face veil constitutes a contravention of fundamental principles of civilisation and represents a systematic rejection of human interaction.[28]

3. THE FACTS OF THE THREE CASES INVOLVING THE "LIVING TOGETHER" ARGUMENT: *SAS, BELCACEMI AND OUSSAR,* AND *DAKIR*

Although designed in neutral terms, as a matter of fact, the *burqa* and *niqab* bans impact primarily Muslim women who may have decided, independently, voluntarily and free from any pressure, to wear a full-face veil for religious reasons.[29] It is not by chance that the cases involving the "living together" concept stemmed from situations related to practising Muslim women. The following section summarizes the relevant facts of *Belcacemi and Oussar v. Belgium*, *Dakir v. Belgium* and *SAS v. France*.

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[26] Hana van Ooijen, *Religious Symbols in Public Functions: Unveiling State Neutrality*, School of Human Rights Research Series (Cambridge: Intersentia, 2012).

[27] *Poposition de Loi,* Doc 52 2289/001, 1 December 2009, http://www.lachambre.be; *Proposition de Loi*, Doc 53 0219/004, http://www.dekamer.be.

[28] *Ibid*.

[29] For example, the French law, on the one hand, sanctions with a fine and/or a course of citizenship education (Art. 3) those who violate the law concealing their face; in addition, it punishes with one year of imprisonment and a large fine, anyone who forces another person, in various way, to cover the face (Art. 4). The Belgian law establishes a penalty of 15 until 25 euros and 1 to 7 days of imprisonment those who appear in public with their face covered or unrecognizable (Art. 2) but, notably, makes no provision for those ones forcing other to wear the veil.

3.1. THE FRENCH CASE: *SAS* (2014)

The case of *SAS*[30] involved a French devout Muslim girl of Pakistani origin, who claimed that the 2010 French ban on the concealment of the face in public spaces[31] constituted a violation of some of her fundamental freedoms under the European Convention. The applicant emphasised that neither her husband nor any member of her family put pressure on her to dress in such a way. Sometimes she wore the *burqa* or the *niqab* "not to annoy others but to feel at inner peace with herself."[32] After the French ban had come into force, she filed an application before the ECtHR claiming that it was a violation of her rights to private life (Art. 8) and to freedom of religion (Art. 9) separately and in conjunction with Art. 14 (prohibition of discrimination).[33]

3.2. THE BELGIAN CASES: *BELCACEMI AND OUSSAR* AND *DAKIR* (2017)

Ms Belcacemi and Ms Oussar had an experience similar to that of the applicant of *SAS*: they were two Muslim women accustomed to wearing the *niqab* in public spaces, on their own initiative and for religious reasons. When the Law of 1 June 2011 was enacted,[34] Ms Belcacemi decided at first to continue to wear the *niqab*; subsequently, feeling under pressure, she decided to avoid doing so.[35] She declared that she had no other choice due to her fear of facing public, social stigma. Differently from the first applicant, Ms Oussar decided to stay at home, with the resulting restriction of her social interaction, private and community life.[36]

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[30] *SAS v. France*, No. 43835/11 (ECtHR, Grand Chamber 2014).

[31] Law 2010-1192 of 11 October 2010, JORF n°0237 du 12 octobre 2010 page 18344 texte n° 1 (France).

[32] *SAS v. France*, para. 12.

[33] The claimant complained also under Art. 3, 11 and 10 but the Court declared the application respectively inadmissible (paras. 69-71), manifestly ill-founded (paras. 72-73) and stated that no issue arises under Article 10 (para. 163).

[34] Law of 1 June 2011, Moniteur Belge F. 2011—1778 C-2011/00424 (Belgium).

[35] See para. 9 of the judgment.

[36] See para. 10 of the judgment.

In the second case, Ms Dakir did not challenge the 2011 law, rather a by-law with a similar content, adopted in 2008 by three municipalities prior to the national ban.[37] She had been wearing the full-face veil since the age of 16, a decision accepted by her husband and her family. She applied to the *Conseil d'État*[38] for the annulment of the ban[39] but her application was dismissed for the failure to satisfy a strict admissibility requirement.

The women filed an application before the Court of Strasbourg, claiming a violation of many of the Convention's rights: among the others, Art. 8 (right to respect for private and family life), Art. 9 (freedom of thought, conscience and religion) and Art. 10 (freedom of expression), separately and in conjunction with Art. 14 (prohibition of discrimination).[40]

4. RELIGIOUS FREEDOM UNDER THE ECHR SYSTEM: ART. 9 OF THE CONVENTION, THE PRINCIPLE OF PROPORTIONALITY AND THE MARGIN OF APPRECIATION

Before analysing the decisions, it is important to describe briefly how the Convention's system guarantees religious freedom in Art. 9 ECHR (freedom of thought, conscience and religion).[41] The first paragraph protects the absolute aspect of the rights enshrined in the provision and requires the State to respect the inner sphere of an individual.[42] The second paragraph of Art. 9 protects the qualified rights relating to the

[37] The cities of Pepinster, Dison, Verviers: para. 9 of the judgment.

[38] Conseil d'État, No. 213.849, A. 189.481/XI-16.517, du 15 juin 2011.

[39] In particular she impugned Art. 113ter of the relevant by-law (para. 10 of the judgement).

[40] Ms Belcacemi and Oussar complained also a breach of Art. 3 (prohibition of inhuman or degrading treatment), Art. 11 (freedom of assembly and association), Art. 2, Prot. 4 (freedom of movement); Ms Dakir claimed in addition a violation of Art. 6, para. 1 (right of access to a court) and Art. 13 (right to an effective remedy).

[41] Carolyn M. Evans, *Freedom of Religion Under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001).

[42] Nicolas Bratza, "The «Precious Asset»: Freedom of Religion Under the European Convention on Human Rights," *Ecclesiastical Law Journal* 14, no. 2 (2012): 256-71.

forum externum, which involves the manifestation of a religion or a belief. The Convention specifies the circumstances in which worship, teaching, practice and observance may be limited by national authorities.[43] To be legitimate, the restriction must be prescribed by law and be necessary in a democratic society; the limitation must be proportionate to its aim, namely public safety and order, protection of health, morals or the rights and freedoms of others.[44] The Court scrutinizes a potentially impinging measure and checks its compliance with the Convention against these criteria. This is the essence of the proportionality test.[45]

In addition to that, other instruments assist the Court and play an important role in the conventionality control. With particular regard to Art. 9, the fact that generally the relations between a state and religious groups are to a great extent shaped by national history and traditions,[46] led the Court of Strasbourg to elaborate and use the concept of the margin of appreciation, in relation to religious matters.[47] The Court grants the Member States of the Council of Europe some room to manoeuvre and combine in various ways both the Convention's standards and the national experiences.[48]

The margin of appreciation is neither pre-determined nor without any limits.[49] Indeed its breadth is dependent on a number of factors, above all the presence of a consensus on a given subject among the Contract-

[43] Peter W. Edge, *Legal Responses to Religious Difference* (The Hague: Martinus Nijhoff Publishers, 2002), 39-60.

[44] Samantha Knights, *Freedom of Religion, Minorities, and the Law* (Oxford: Oxford University Press, 2007), 49-53.

[45] George Letsas, "Two Concepts of the Margin of Appreciation," *Oxford Journal of Legal Studies* 26, no. 4 (21 December 2006): 705-32.

[46] See, for an overview: Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (Oxford: Oxford University Press, 2011).

[47] Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards," *International Law and Politics* 31, no. 4 (1998): 843-54.

[48] Cfr. *Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms.*

[49] Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg: Council of Europe, 2000); Dean Spielmann, "Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?," 2013, http://www.echr.coe.int.

ing Parties of the Convention. When the States of the Council of Europe regulate a certain matter in a similar fashion, the Court acknowledges the existence of a consensus and narrows down the margin of appreciation left to the respondent Government. When the practice of the European legal orders is different and there is no shared opinion, the Court recognizes the absence of the consensus on the matter at stake and exercises a degree of judicial restraint, granting a wider margin.

5. THE DECISIONS OF THE COURT OF STRASBOURG

5.1. THE *SAS* CASE AND THE FIRST APPEARANCE OF THE "LIVING TOGETHER" CONCEPT

In the 2014 French case, the Grand Chamber recognized the existence of an interference with the applicant's rights but rejected the applicant's complaints. However, the Court did positively[50] reject three of the four arguments advanced by the French Government to justify the ban: public safety,[51] respect for women's dignity,[52] and gender equali-

[50] As noted by Lucy Vickers, in rejecting these three rationales justifying the ban, the Court took some steps towards a positive evolution of its jurisprudence on the veil debate. In particular, it correctly specified that limiting the right to manifest one's religion based on the public safety ground requires a concrete basis. Lucy Vickers, "Conform or Be Confined: S.A.S. v. France," *OxHRH Blog*, 2014, www.ohrh.law.ox.ac.uk.

[51] A general ban "can be regarded as proportionate *only* in a context where there is a *general* threat to public safety." *SAS v. France*, para. 139. See also Eva Brems, "Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings," *Journal of Law and Policy* 22 (2013): 542-43. See also *Vojnity v. Hungary*, No. 29617/07 (ECtHR 2013). Cfr. *Ahmet Arslan et al. v. Turquie*, No. 41135/98 (ECtHR, Grand Chamber 2010).

[52] The Court took the view that although respect for human dignity is paramount, it cannot justify an unlimited blanket ban. At para. 120; Teresa Sanader, "Religious Symbols and Garments in Public Places – A Theory for the Understanding of S.A.S. v. France," *Vienna Journal on International Constitutional Law / ICL Journal* 9 (2015): 37. See also Stephanie Berry, "SAS v. France: Does Anything Remain of the Right to Manifest Religion?," *EJIL: Talk!*, 2 July 2014, http://www.ejiltalk.org.

ty.[53] At the same time, the Court justified the French ban by appealing to the "living together" concept, formulated at paragraph 121 of the decision.[54]

> The face plays an important role in *social interaction*. It (The Court) can understand the view that individuals who are present in places open to all, may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of *open interpersonal relationships*, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others *to live in a space of socialisation which makes living together easier.*[55]

The case of *SAS* raised the concerns of the legal doctrine for the risk of impairing the soul of the Convention.[56] Two dissenting judges sharply questioned the concept of "living together" as "far-fetched and vague"[57] and the separate opinions delivered in the Belgian cases echoed the same criticism.[58]

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[53] The Court rejected the Government's argument stressing that "a State Party cannot invoke gender equality in order to ban a practice that is defended by women". At para. 119. June Edmunds, "The Limits of Post-National Citizenship: European Muslims, Human Rights and the Hijab," *Ethnic and Racial Studies* 35, no. 7 (July 2012): 1192. Zachary R. Calo, "Islamic Headscarves, Religious Pluralism, and Secular Human Rights," International Consortium for Law and Religion Studies Conference, Santiago, Chile, September 2011 (SSRN, 28 August 2011): 2, http://ssrn.com.

[54] This argument is not expressly mentioned by the Convention as permissible ground for limiting fundamental freedoms but was accepted by the Court as a legitimate aim, falling within the need to protect rights and freedom of others. It was mentioned in some documents published by the Council of Europe but has never been engaged by the Court to justify a restriction upon fundamental rights before *SAS*. See Yasha Lange, *Living Together* (Strasbourg: Council of Europe, 2009).

[55] At para. 121. Italics added.

[56] *SAS* has been considered one of the worst rulings of 2014: see the poll by the *Strasbourg Observers* blog at https://strasbourgobservers.com.

[57] See the joint partly dissenting opinion of judges Nussberger and Jäderblom in the case of *SAS*.

[58] See the separate opinion of judges Spano and Karakaş in *Dakir*.

5.2. THE BELGIAN CASES OF *BELCACEMI AND OUSSAR*, AND *DAKIR*: THE ENDORSEMENT OF *SAS*

In the 2017 judgements, the Court recalled and applied the principle established in *SAS* since the Belgian ban was expressed in legal terms similar to the French 2011 prohibition.[59]

The ECtHR confirmed the absence of a clear consensus at a European level and allowed a wide margin of discretion to the respondent State as to the necessity of a restriction on the right to manifest a religion or a belief.[60] In both cases, ultimately, it stated that there had been no violation of Art. 9 and 8, the threshold of the minimal level of seriousness of ill-treatment had not been met in application of Art. 3, and the complaints under other provisions had been declared as manifestly ill-founded. The Court did find a violation of Art. 6, para. 1, in *Dakir*; however, this added nothing new to the debate on religious freedom.[61]

These judgements confirmed that the Court accepts *vivre ensemble* as one of the legitimate aims relevant for Art. 9, para. 2: the following Section describes the notion of "living together" and afterwards the main issues related to its incorporation into the Convention's system.

6. *FIRST OBSERVATION:* A TENDENCY TOWARDS ABSTRACT IDEAS. FROM BEHAVIOURS THROUGH SYMBOLS TO MODELS OF INTEGRATION

What seems the most problematic point of the French and Belgian decisions is that the Court accepted the "living together" rationale, while adopting a highly abstract justification and assuing a deferential attitude towards the member States. This Section argues that the ECtHR demonstrated a capacity to evaluate concrete circumstances and stick to

[59] *Belcacemi and Oussar v. Belgium* para. 49 and 53ff; *Dakir v. Belgium* para. 51 and 55ff.

[60] *Belcacemi and Oussar v. Belgium* para. 51; *Dakir v. Belgium* para. 54.

[61] Frank Cranmer, "Strasbourg Upholds Belgian Niqab Ban: Belcacemi and Dakir," Law & Religion UK, http://www.lawandreligionuk.com.

the facts in some of its early decisions, in contrast to the current development of its jurisprudence on the Islamic veil.

On the one hand, the full-face veil has been defined as one of the "dilemma cases" discussed in the Strasbourg's courtrooms in recent years[62] and the great caution of the Court may be partly understandable. However, the Convention does not mention the idea of the minimal requirements of life in a society, nor does it make express reference to face-to-face communication. Moreover, the "breath-taking"[63] width of the margin of appreciation allowed by the Court in its interpretation of Convention compliance leads us to further reflections involving the abstract nature of the motivation given in the judgments.

6.1. THE COURT HAS THE CAPACITY TO STICK TO THE FACTS: RE-READING EARLY DECISIONS ON RELIGIOUS FREEDOM RELATING TO BEHAVIORS AND RELIGIOUS FREEDOM

It has been suggested that in the most recent case-law related to the Islamic headscarf,[64] the Court makes assumptions about female religious practices without proper investigation of the nature of women's preferences.[65] Contrary to this trend, reading two earlier cases, related to the area of the *forum internum* and proselytism,[66] reveals that the Court is actually equipped with the sophisticated capacity to combine the abstract nature of the law with nuanced factual considerations.[67]

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[62] Gerards Janneke, "Procedural Review by the ECtHR: A Typology," in *Procedural Review in European Fundamental Rights Cases*, eds. Eva Brems and Gerards Janneke (Cambridge, UK: Cambridge University Press, 2017), 147.

[63] Mark Movsesian, "European Human Rights Court to France: Do Whatever You Want," *CENTER FOR LAW AND RELIGION FORUM*, 3 July 2014, https://clrforum.org.

[64] See the case-law quoted at fn. 74-80.

[65] Jill Marshall, "S.A.S. v. France: Burqa Bans and the Control or Empowerment of Identities," *Human Rights Law Review* 15, no. 2 (6 January 2015): 377-89.

[66] Paul Bickley, *The Problem of Proselytism* (Theos, 2015), http://www.theosthinktank.co.uk.

[67] Jim Murdoch, *Protecting the Right to Freedom of Thought, Conscience and Religion under the European Convention on Human Rights* (Strasbourg: Council of Europe, 2012), 46-49, http://www.coe.int.

6.1.1 *KOKKINAKIS V. GREECE* (1993)

For example, in its first case on religious freedom, the matter of proselytism was brought to Strasbourg: in *Kokkinakis v. Greece*,[68] the Court balanced the right to freedom of religion of Mr Kokkinakis, a Jehovah's witness convicted of proselytism, against the need to safeguard the rights and liberties of the proselytized.[69] What is remarkable is the attempt to mark the difference between ordinary degrees of psychological influence among people ("proper proselytism") and dangerous and immoral behaviours ("improper proselytism").[70] This required isolating and giving prominence to certain human actions at the risk of being coercive. Thus, the Court drew a line between what is legal and what is not, putting an "inevitable ingredient of its interpretative practice" in the arena of the legal reasoning.[71]

6.1.2 *LARISSIS V. GREECE* (1998)

In a subsequent decision, the ECtHR returned to the issue of evangelization. In *Larissis v. Greece*,[72] it reflected on the psychological pressure exercised by the applicants, three senior officers of the Greek air force, convicted of proselytising airmen and civilians. Here the Court emphasised that the army may actually alter the perception of a conversation and switch it from "an innocuous exchange of ideas" to "a form of harassment or the application of undue pressure in abuse of power."[73]

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[68] *Kokkinakis v. Greece*, No. 14307/88 (ECtHR 1993).

[69] See Section 2 of the Greek law, no. 1672/1939.

[70] *Kokkinakis v. Greece* at para. 48. In particular, it defined the improper proselytism as the use of improper pressure on people in distress or in need, entailing the use of violence or brainwashing. See T. Jeremy Gunn, "Adjudicating Rights of Conscience Under the European Convention on Human Rights," in *Religious Human Rights in Global Perspective: Legal Perspectives*, eds. John Witte Jr and Johan D. van der Vyver, vol. 2 (The Hague: Kluwer Law Inernational, 1996), 305-30.

[71] Mark Hill and Katherine Barnes, "Limitations on Freedom of Religion and Belief in the Jurisprudence of the European Court of Human Rights in the Quarter Century since Its Judgment in Kokkinakis v. Greece," *Religion & Human Rights* 12, no. 2-3 (7 October 2017): 174-97.

[72] *Larissis et al. v. Greece*, No. 140/1996/759/958–960 (ECtHR 1998).

[73] *Ibid.*, 50-51.

6.2 ON RELIGIOUS GARMENTS, THE COURT TOOK A MORE ABSTRACT APPROACH: THE ISLAMIC VEIL

6.2.1 *DAHLAB V. SWITZERLAND* (2001)

By contrast, in *Dahlab* the Court started to blur the proximity to facts. The Court dismissed, as manifestly ill-founded, the application of a Swiss primary school teacher, sacked because of her refusal to remove the *hijab* during her working hours. Even though the ECtHR admitted that it was very difficult to assess the impact that the wearing of a headscarf may have on the freedom of conscience and religion of very young children, finally it was persuaded by the need to safeguard pupils' conscience from the "impact that a powerful external symbol such as the wearing of a headscarf" could have.[74]

6.2.2 FOLLOWING CASE-LAW ON THE ISLAMIC VEIL[75]

The abstract tendency can also be identified in the case-law on the Islamic veil, relating to individuals performing different tasks, such as university professors,[76] university students,[77] secondary school pupils,[78] or relating to different circumstances, such as sport classes[79] or the hospital environment[80]. A note of caution should be sounded when it comes to the importance of ensuring an appropriate learning environment to young pupils and children; nevertheless, it is hard to disagree when the evidence adduced is described as too weak[81] in respect of the

[74] *Dahab v. Switzerland* para. 1. The reasoning culminated expressing the difficulty to "reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination."

[75] See the Special Issue of the Journal *Religion, State and Society*, "The European Court of Human Rights and minority religions", no. 45 (2017).

[76] *Kurtulmus v. Turkey*, No. 65500/01 (ECtHR 2006).

[77] *Leyla Sahin v. Turkey*, No. 44774/98 (ECtHR 2005).

[78] *Köse and others 93 v. Turkey*, No. 26625/02 (ECtHR 2006).

[79] *Dogru v. France*, No. 27058/05 (ECtHR 2008).

[80] *Ebrahimian v. France*, No. 64846/11 (ECtHR 2015).

[81] Carolyn Evans, "The «Islamic Scarf» in the European Court of Human Rights," *Melbourne Journal of International Law* 4, no. 7 (2006): 52.

overall legal reasoning and the parameters used by the Court to determine the breadth of the margin of appreciation.[82]

6.3 FINALLY, THE "LIVING TOGETHER" CONCEPT: AN ABSTRACT EVALUATION OF THE INTEGRATION MODEL

In the three cases on the "living together" concept as related to the full-face veil, what was at stake was not the obligation to dress in a neutral way, both in respect of the neutrality principle or safety considerations. Rather, the Court was called to take a position on the way a member state integrates minorities.[83]

In respect to the latter, many attitudes could be identified at the moment as a state's responses to different religious, cultural and ethnical demands, such as integration, assimilation, accommodation, or other forms of shared governance and the discussion is still open for debate.[84] Nevertheless, the jurisprudence of Strasbourg is consistent in its conception of the states as neutral, impartial organizers and promoters of a peaceful coexistence of different religious faiths.[85]

Despite this, the Court in the "living together" cases considered only briefly the risk of consolidating the stereotypes affecting the Muslim community and limited the exercise of the conventionality control due to the democratic decision-making process lying behind the adoption of the ban at the national level.[86] Furthermore, it neither engaged in a concrete evaluation of that process nor did it question the pragmatic

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[82] Effie Fokas, "Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence," *Oxford Journal of Law and Religion*, no. 4 (2015): 58.

[83] The issue was channelled to Strasbourg through what has been described as an identity marker: Ayelet Shachar, "Freedom of the Dress. Religion and Women's Rights in Secular States," *Harvard International Law Review* 32, no. 2 (2010), 53-59. In this respect, it is noteworthy that the French penalties for the concealment of the face are a fine or a "citizenship training sessions".

[84] Nicholas Aroney and Rex Ahdar, "The Topography of Shari'a in the Western Political Landscape," in: *Id.*, *Shari'a in the West* (Oxford, UK: Oxford University Press, 2010), 23-25.

[85] Among many, *Dogru v. France*, para. 62.

[86] *Belcacemi and Oussar v. Belgium*, paras. 52-54.

application of the full-face veil ban, ultimately respecting the "choice of a society" *per se*.[87]

The premises of this reasoning are uncertain: on the one hand, the Court does not have the authority to impose uniform social behavioural norms;[88] on the other hand, it seems to be an argument which is challenged by empirical evidence.[89] Grounding the decision on questionable factual elements should have required a more exhaustive and meticulous motivation in the judgment, whatever the final outcome of the decision might have been. To do so, the Court could have exploited the opportunity to fully engage and commit itself to a more substance-oriented approach, as we will see in the following Section.

7. *SECOND OBSERVATION*: PROPORTIONALITY AS EXPRESSLY REQUIRED BY THE CONVENTION, THE NEED FOR AN ENGAGED COURT, THE "LIVING TOGETHER" CONCEPT READ IN CONJUNCTION WITH OTHER CONVENTION PRINCIPLES

A full engagement of the Court in evaluating concrete circumstances and a more substance-oriented judgement involving all the knowledge it gathers together could be beneficial for two reasons: establishing a favourable setting for a stricter Convention compliance check and, therefore, adopting decisions which are potentially less challenging for the Court's authority.

7.1 A PROPORTIONALITY TEST IS EXPLICITLY REQUIRED BY ART. 9, PARAGRAPH 2, OF THE CONVENTION

The most suitable tool to facilitate this engagement is the proportionality test which, in the case of Art. 8-11, is incorporated in the

[87] *Belcacemi and Oussar v. Belgium* paras. 53. Stéphanie Hennette Vauche, "Is French laïcité Still Liberal? The Republican Project under Pressure (2004–15)," *Human Rights Law Review* 17 no. 2 (2017): 285-312.

[88] Esther Erlings, "The Government Did Not Refer to It': SAS v. France and Ordre Public at the European Court of Human Rights," *Melbourne Journal of International Law* 16 (2015): 10, 21.

[89] See Brems, *The Experiences of Face Veil Wearers in Europe and the Law*.

second paragraph of the provision and therefore it is textually required by the Convention.[90] In fact, assessing whether a specific measure promotes effectively the purpose it is supposed to pursue and examining its necessity in a given situation is a process informed by empirical evidence[91] and depends on the factual circumstances of each case.[92] Moreover, proportionality has been largely recognized as an essential tool to adjudicate hard cases such as those at stake: "the more serious a limitation of rights is, the more evidence the court will require that the factual basis of the limitation has been correctly established."[93]

7.2 THE NEED FOR AN ENGAGED COURT: THE ENHANCEMENT OF AMICUS CURIAE BRIEFS

A judicial attitude strongly based on reality could also be facilitated by ensuring more opportunity for the submission of third party representations and subsequently taking position on the briefs submitted.

In the three cases we are commenting on, *Amicus Curiae* briefs were filed mostly by NGOs and Human Rights Centres. These organizations tried to widen the Court's knowledge by adding empirical material typical of sociological investigation to the debate.[94] surveys, in-depth interviews, qualitative analyses and speeches involving women who actually wear different types of veil.[95] In addition, they described in great detail the different legislative processes that took place in Belgium and France, explaining their specific features using a collection of expert

[90] Art. 8-11 ECHR.

[91] Niels Petersen, "Avoiding the Common-Wisdom Fallacy: The Role of Social Sciences in Constitutional Adjudication," *International Journal of Constitutional Law* 11, no. 2 (2013): 302.

[92] Olivier De Schutter and Françoise Tulkens, "The European Court of Human Rights as a Pragmatic Institution," in *Conflicts Between Fundamental Rights*, ed. Eva Brems, 169-216. Antwerp-Oxford-Portland: Intersentia, 2008.

[93] Julian Rivers, "Proportionality and Variable Intensity of Review," *The Cambridge Law Journal* 65, no. 1 (March 2006), 193.

[94] Ineke Stoop and Eric Harrison, "Classification of Surveys," in *Handbook of Survey Methodology for the Social Sciences*, ed. Lior Gideon, 7-21. New York: Springer Science & Business Media, 2012.

[95] *SAS v. France*, at paras. 89-105.

opinions, the advice of the Council of State and making reference to the length and quality of the discussion in the parliamentary Chambers.[96]

Their attempt was threefold: firstly, drawing the attention of the Court to the evaluation of concrete circumstances at hand. Secondly, demonstrating that interaction between individuals is actually possible even while wearing a full-face veil. Thirdly, showing the erroneous assumption behind the French and Belgian bans insofar as the veil does not amount to a withdrawal from social interaction.[97]

The Court did not address this empirical material in the decisions and referred to it by means of a mere summary of the arguments presented. It expressed strong concerns relating to the risk of increasing intolerance and prejudice against Muslims[98] but it eventually declared, without a robust motivation, that permitting or prohibiting the full-face veil in public "constitutes a choice of society,"[99] referring to the democratic process lying behind the adoption of the laws.[100]

Being more sensitive to the third parties' interventions could have been an interesting opportunity to reach an interesting balance and it could be beneficial as a response to the direct criticism relating to the Court's authority and legitimacy.[101]

8. CONCLUSIONS

As it is quite recent in its jurisprudential elaboration, the contours of the "living together" argument remain still uncertain; the need to revisit

[96] Human Rights Centre of Ghent University, "Written Submission by the Human Rights Centre of Ghent University in the Case of Dakir v. Belgium," 4.

[97] In addition, they marked some Islamophobic attitudes emerged in the preparatory works of the 2010. See Open Society Justice Initiative, "Written Comments of the Open Society Justice Initiative in the Case of SAS v. France," 2014 and *Id.*, "After the Ban: The Experiences of 35 Women of the Full-Face Veil in France," 2013, https://www.opensocietyfoundations.org.

[98] *Belcacemi and Oussar v. Belgium*, para. 52; *Dakir v. Belgium*, para. 55.

[99] *SAS v. France*, para. 153.

[100] *SAS v. France*, at paras. 153-155; *Dakir v. Belgium*, para. 55.

[101] Allan R.S. Trevor, "Democracy, Legality, and Proportionality," in *Proportionality and the Rule of Law*, eds. Grant Huscroft, Bradley W. Miller and Gregoire Webber (New York: Cambridge University Press, 2014), 211.

its meaning and implications is strongly encouraged by many scholars, especially if future case-law will refer to it as one of the Strasbourg Court's principles on religious freedom, together with pluralism, diversity, tolerance, and reasonable accommodation.[102]

A stricter application of the proportionality test and a greater consideration of factual circumstances, giving prominence, for example, to the third parties' interventions, could help to prevent *vivre ensemble*[103] from a potential misuse and ensure that religious freedom will not be "beautiful and unattainable."[104]

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[102] Christos Tsevas, "Human Rights and Religions: «Living Together» or Dying Apart? A Critical Assessment of the Dissenting Opinion in S.A.S. v. France and the Notion of «Living Together»," *Religion, State and Society* 45, no. 3-4 (2 October 2017): 203-15 (see in particular page 211).

[103] *Belcacemi and Oussar v. Belgium* para. 52: *l'essence du principe du «vivre ensemble» est tellement malléable et floue qu'il peut potentiellement servir d'outil rhétorique*.

[104] Silvio Ferrari, "Who Needs Freedom of Religion?," in *The Confluence of Law and Religion: Interdisciplinary Reflections on the Work of Norman Doe*, eds. Frank Cranmer, Mark Hill, Celia Kenny, and Russell Sandberg, 117-90 (Cambridge: Cambridge University Press, 2016).

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ARGUMENT ODWOŁUJĄCY SIĘ DO ŻYCIA RAZEM (LIVING TOGETHER) W ORZECZNICTWIE EUROPEJSKIEGO TRYBUNAŁU PRAW CZŁOWIEKA

Streszczenie

Artykuł analizuje trzy sprawy, w których Europejski Trybunał Praw Człowieka użył argumentu odwołującego się do życia razem (*living together*), akceptując go jako uzasadnienie dla zakazu zasłaniania twarzy (*burqa* i *niqab*): *SAS v. France* (2014)*, Belcacemi and Oussar v. Belgium* (2017) oraz *Dakir v. Belgium* (2017). Analizie poddane jest samo pojęcie „życia razem" w celu wyjaśnienia jego znaczenia i rozwoju we francuskim i belgijskim kontekście. Zdaniem Autorki brakuje pogłębionych analiz prawnych, które wystarczająco uzasadniałyby stosowanie tego nowego argumentu. Artykuł zamyka postulat bardziej skrupulatnego uwzględniania okoliczności faktycznych przy podejmowaniu decyzji. Podkreśla się przy tym, że Trybunał powinien w pełniejszym zakresie brać pod uwagę całokształt posiadanych informacji, włączając w to materiał empiryczny dostarczany przez podmioty interweniujące na

zasadzie strony trzeciej. Byłoby to korzystne z dwóch powodów: ułatwiałoby zastosowanie testu proporcjonalności oraz chroniłoby Trybunał przed niebezpiecznym podważaniem jego autorytetu.

Słowa kluczowe: Europejski Trybunał Praw Człowieka; *burqa* i *niqab*; *living together*; muzułmańskie nakrycie głowy; wolność religijna; proporcjonalność

Key words: European Court of Human Rights; *burqa* and *niqab*; living together; Muslim veil; religious freedom; proportionality

Tłumaczenie: Daria Bębeniec